IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COUNTRYWIDE FINANCIAL CORPORATION, et al.,	)	No. 15-72700
Petitioners,	)	NLRB No. 31-CA-072916
v.	)	NLRB No. 31-CA-072918
NATIONAL LABOR RELATIONS BOARD,	)	
Respondent.	)	
	)	
NATIONAL LABOR RELATIONS BOARD,	)	No. 15-73222
Petitioner,	)	NLRB No. 31-CA-072916
v.	)	NLRB No. 31-CA-072918
COUNTRYWIDE FINANCIAL CORPORATION, et al.,	)	
Respondents.	)	

ON PETITION FOR REVIEW FROM THE DECISION OF THE NATIONAL LABOR RELATIONS BOARD, BOARD CASE NOS. 31-CA-072916 AND 31-CA-072918

REPLY BRIEF FOR PETITIONERS and CROSS-RESPONDENTS COUNTRYWIDE FINANCIAL CORPORATION; COUNTRYWIDE HOME LOANS, INC.; and BANK OF AMERICA CORPORATION

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I.
INTRODUCTION

The Board's Opposition asks this Court to ignore United States Supreme Court precedent with regard to the Federal Arbitration Act ("FAA") and the overwhelming majority of Courts of Appeal and district courts that have concluded that "the NLRB's decision in *D.R. Horton* . . . conflicts with the explicit pronouncements of the Supreme Court concerning the policies undergirding the [FAA]." *See Richards v. Ernst & Young, LLP*, 744 F.3d 1072, 1075 n.3 (9th Cir. 2013). The Court should adopt its previous conclusion in *Richards* and reject each of the arguments that the Board raises in its Opposition that go against the great weight of authority on the issue.

First, the Board applies a strained interpretation of the law regarding what Section 7 guarantees employees and how employees can resort to the courts for legal protection of their ability to engage in concerted activity for mutual aid or protection. Simply put, as other Circuits already have held when rejecting the Board's position in this regard, employees do not have a substantive right under Section 7 of the National Labor Relations Act ("NLRA") to pursue claims on a collective or class basis. *See, e.g.*, *D.R. Horton v. NLRB*, 737 F.3d 344 (5th Cir. 2013) (holding that "use of class action procedures . . . is not a substantive right" under Section 7); *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015) (same). Rather, as the United States Supreme Court made clear long ago, a class

action is a procedural mechanism that may be waived by litigants. Nothing in Section 7 or applicable caselaw changes that finding or otherwise grants employees a substantive right to pursue class actions.

Next, the Board impermissibly attempts to expand the scope of its *D.R. Horton* administrative decision by claiming the Companies violated Section 8(a)(1) when they sought to enforce the "silent" Arbitration Agreements in conformity with Supreme Court precedent. The Board's attempt to sidestep controlling Supreme Court precedent in this way already has been rejected by the Fifth Circuit when enforcement of *D.R. Horton* was sought. In particular, the Opposition contends (and the Board panel majority has incorrectly found) that it is unlawful for the Companies to argue in court that, based on the Supreme Court's decisions in *Stolt-Nielsen* and *Concepcion*, the Arbitration Agreements require the claims be arbitrated on an individual basis. Notably, the Board does not identify any legal support for such a finding where the arbitration agreement being challenged as interfering with employees' Section 7 rights does not expressly bar any collective activity by employees and the purported violative conduct is the enforcement of the arbitration agreements according to its terms via a Supreme Court-approved process of moving to compel arbitration pursuant to the FAA. The Board remains silent on the subject because there is no support for its position.

As above, the Companies' actions in seeking to enforce the Arbitration Agreements could not have sought to restrict employees' Section 7 rights, as the Board contends, since employees do not have Section 7 rights to pursue class actions. Moreover, also contrary to the Board's contentions, the Agreements did not prospectively waive employees' Section 7 rights for the same reason, as well as because the Agreements were silent as to class actions and, thus, they in no way even addressed the employees' future ability to pursue class or collective actions. The Supreme Court, meanwhile, has expressly held that parties may enforce arbitration agreements according to their terms and that, if an agreement does not expressly provide for class actions in arbitration, then the parties have not agreed to permit class arbitration. By following the Supreme Court's pronouncements in seeking to enforce the Agreements, pursuant to the FAA, Petitioners cannot be found to have violated the NLRA. As such, the Court should deny enforcement of the Order in its entirety.

Moreover, contrary to the arguments in the Opposition that the motion to compel arbitration filed by Petitioners in federal court is not protected petitioning under the First Amendment, Supreme Court precedent makes clear that this alleged unlawful act involves constitutionally protected activity that cannot be properly deemed violative conduct.

Lastly, Petitioners did not maintain an arbitration agreement that "interferes with employees' right to file charges with the Board" in violation of Section 8(a)(1) of the Act. In its Opposition, the Board has focused myopically on a single facially-neutral sentence of a two-page agreement to support its argument that employees would reasonably construe the Arbitration Agreements to prohibit their right to file charges with the NLRB. Specifically, the Board claims that employees would reasonably believe that they must arbitrate any unfair labor practice charges instead of going directly to the NLRB since the Arbitration Agreements state that they cover all "claims for . . . violation of any federal, state or other governmental constitution, statute, ordinance, regulation, or public policy."

However, the situation presented here demonstrates that, objectively speaking, the employees would not have reasonably construed the Arbitration Agreements to prohibit their right to access the NLRB and, instead, they would understand that they properly could file claims with the NLRB. The only reasonable interpretation of the Arbitration Agreements, when they are read in their entirety – as the Board has held that they must – is that they do not in any way include within their coverage the administrative filing of an unfair labor practice charge with the NLRB, which does not implicate the judiciary or court system in any way. Notably, both of the Claimants actually filed the instant charges with the NLRB, exemplifying that the Arbitration Agreements did not in any way restrict

Claimants' ability to seek Board relief and also confirming that Claimants themselves did not reasonably believe that they were precluded from filing such claims with the NLRB. Additionally, there is no legal basis to support the Board's arguments towards this issue. The Board's misguided attempts to rely on *U-Haul* do not change the conclusion that the controlling law mandates a finding that the Arbitration Agreements at issue do not violate the Act in any way.

Simply put, the only reasonable interpretation of the Arbitration Agreements, when they are read in their entirety and viewed in light of Claimants' acts underlying this matter, is that they apply only to civil litigation matters that potentially could be filed in a court of law and do not have any application at all to any claims filed with administrative agencies such as the NLRB. And, it also is clear here that reasonable employees – specifically including both of the Claimants – would have believed that they could file unfair labor practice charges with the NLRB and that the Arbitration Agreements did not prohibit them from doing so. Accordingly, the Court should reject the Board's arguments regarding this issue and refuse to enforce the Orders in this regard.

II.
ARGUMENT

A. The Companies Acted in Conformity with Supreme Court Precedent when They Sought to Enforce the Terms of the Arbitration Agreements that are Silent as to Class Claims and They Did Not Violate the NLRA By Seeking to Enforce Them

Contrary to the Board's arguments, Petitioners did not violate any rights protected by the NLRA, when they sought to compel Claimants to arbitrate their claims pursuant to FAA precedent. Simply put, the NLRA does not provide employees with the substantive right to pursue class action lawsuits. Rather, as the Supreme Court has established, a class action is a procedural device and it may be waived through arbitration agreements. Here, the parties mutually agreed to arbitrate any employment-related claims via a bilateral arbitration process and the applicable Agreements are silent as to whether or not the employees could pursue their claims on a class-wide basis. Accordingly, the Companies' actions in exercising their legal rights and seeking to compel arbitration, pursuant to the FAA, consistent with the Supreme Court's mandate, was not an unlawful action that somehow violated the NLRA and the employees' right to engage in concerted activities. Moreover, the employees actually did act in concert when they collectively pursued their claims together and, ultimately, reached a settlement on a class-wide basis. As such, Petitioners did not violate the NLRA and the Court should reject any argument to the contrary.

1. Contrary to Plaintiff's Strained Reading of the Act, Section 7 of the NLRA Does Not Provide Employees with a Substantive Right to Pursue Claims through a Class Action

As other Circuits already have held when rejecting the Board's position in this regard, employees do not have a substantive right under Section 7 of the NLRA to pursue claims on a collective or class basis. *See*, *e.g.*, *D.R. Horton*, 737 F.3d 344 (holding that "use of class action procedures . . . is not a substantive right" under Section 7); *Murphy Oil*, 808 F.3d 1013 (same). The Board's strained interpretation of what Section 7 guarantees employees and how employees can resort to the courts for legal protection of their ability to engage in concerted activity for mutual aid or protection should be given no weight.

Notably, the Board has no legal support for its position other than its own creation of a few years ago. Prior to the Board's own *D.R. Horton* administrative decision in 2012, no precedent existed for the conclusion that the NLRA provides employees with the substantive right to adjudicate claims on a class-wide basis.

Contrary to the assertions raised in the Opposition, none of the earlier decisions requires a finding that the enforcement of arbitration agreements pursuant to their terms, as dictated by the FAA, violates existing caselaw. The Company's position is not inconsistent with the cited cases' findings that employers are prohibited from taking adverse action against employees who initiate claims or encourage others to act accordingly.

Petitioners do not dispute that the NLRA protects employees from workplace rules that either explicitly restrict Section 7 activity or an employee may "reasonably construe" as restricting Section 7 activity. *See Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004). They also do not dispute that, in *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-66 (1978), the Supreme Court explained that the "'mutual aid or protection' clause protects employees from retaliation by their employer when they seek to improve working conditions through resort to administrative and judicial forums." But, those decisions do not require a conclusion that employees have an unwaivable substantive right to assert employment claims on a class basis.

The Board's arguments do not override the expressed basic purposes of arbitration. *See, e.g., Richards*, 744 F.3d 1072 (affirming bilateral arbitration order); *Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072 (9th Cir. 2014) ("For certain types of disputes the speed, informality, and lower costs of arbitration provide real advantages over litigating in court[,]" and, in that way, the parties receive the "presumed benefits of agreeing to arbitrate all employment-related disputes[.]"). Instead, the Board conflates illegal work rules with employees' conduct that may be protected against retaliation. For example, the Board's citation to the long-standing decision in *Salt River Valley Water Users' Ass'n v. NLRB*, 206 F.2d 325, 328-29 (9th Cir. 1953), that employees are protected

from termination and other retaliation for encouraging others to file suit against their employer for wage claims under the FLSA does not mean those same employees are guaranteed the right to pursue claims as a class or collective action. Similarly, that conclusion is not changed by the Supreme Court's decision in *Eastex*, 437 U.S. at 560, finding that employees are protected from retaliation when they exercise their right to advocate for the distribution of political speech in support of a union. Moreover, the other cases cited by the Board provide no help either. Courts' acknowledgement that employees' exercise of other activity protected under the NLRA does not mean that those employees have a guarantee that they can bring a lawsuit that will proceed in a particular forum or in a specific type of proceeding of the employees' choosing, such as a class or collective action.

Indeed, the Supreme Court has long made it clear that a class action is a procedural mechanism that may be waived by litigants. *See, e.g.*, *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980) ("right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims"); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991) (holding that parties do not have a right to pursue class actions). Nothing in Section 7 of the NLRA changes that finding or otherwise grants employees a substantive right to pursue class actions.

Yet, in its Opposition, the Board asks this Court to disregard numerous Supreme Court decisions on the enforcement of the FAA and arbitration agreements and simply blindly follow the Board panel majority's Order in this case, which flows from the Board's administrative decisions in *D.R. Horton* and *Murphy Oil* (that have been rejected by numerous courts throughout the country and specifically were denied enforcement by the Fifth Circuit). The Board fails to explain why the situation here – involving a silent arbitration agreement and a litigation (and arbitration) where two former employees acted collectively together to reach a class-wide settlement – justifies such a result. Simply, there is no legal basis for the Court to take the course of action proposed by the Board or otherwise enforce the Order issued by the Board panel majority.

And, notably, in this instance, Claimants actually proceeded in both federal court and arbitration ***collectively***, ultimately reaching a settlement of the claims on a class-wide basis. Thus, contrary to the Board's assertions throughout the Opposition, Claimants' substantive right under the NLRA to "engage in . . . concerted activities for the purposes of . . . mutual aid or protection" has not been and never was violated. Accordingly, there is no basis to find an unfair labor practice in these matters or otherwise conclude that Claimants were prevented from engaging in concerted activities for the purpose of mutual aid or protection.

Consequently, the Court should follow the lead of virtually all other courts throughout the country who have rejected the Board's position and find that the employees' do not have the substantive right to pursue claims on a class-wide basis and that any of the employees' NLRA rights were not violated as a matter of law.

2. Petitioners Relied Upon Controlling United States Supreme Court Precedent When They Sought to Enforce the Arbitration Agreements that Lawfully Require Arbitration of Employment-Related Claims

The Board's circular reasoning to cite the Board panel majority's Order and the Board's earlier [unenforceable] administrative decisions in *D.R. Horton* and *Murphy Oil* cannot override the Supreme Court's pronouncements on the subjects at issue here. The principles stated by the Supreme Court in *Stolt-Nielsen* and *Concepcion*, among others, specifically authorize the Companies, pursuant to the FAA, to lawfully seek to enforce the Arbitration Agreements that are silent on the issue of class-wide arbitration and enforce them according to their terms. Nonetheless, the Board attempts to "double-down" on its administrative decisions in *D.R. Horton* and *Murphy Oil* and have this Court disregard the Supreme Court's precedential decisions, by finding that Petitioners committed an unfair labor practice by enforcing the terms of the "silent" Arbitration Agreements and seeking to compel Claimants to arbitrate their claims.

Simply put, there is no legal precedent for a finding in favor of the Board's argument that an employer violates the Act by filing in federal court a motion to

compel arbitration based on an arbitration agreement that is completely silent as to class or collective actions. In fact, the Board does not cite to a single case or earlier Board decision in which an employer was found to have violated the NLRA by seeking to enforce in court the terms of an arbitration agreement that is silent as to the issue of whether an employee can pursue claims on a class or collective basis (*i.e.*, does not contain a class waiver), since there is no such decision in existence. Accordingly, for all the reasons described herein and in Petitioners' Opening Brief, that portion of the Board panel majority's Order completely lacks any support and the Court should refuse to enforce it as to these issues.

The Seventh Circuit's decision in *Lewis v. Epic Sys. Corp.*, -- F.3d --, 2016 WL 3029464 (7th Cir. May 26, 2016), should not bring a different outcome or otherwise persuade this Court to reach a conclusion contrary to that reached by virtually all other courts when considering these issues. First, *Lewis* arose in a different context, *i.e.*, a private FLSA litigation and did not involve an effort by the Board to find that an employer committed an unfair labor practice. Second, as recognized by the Seventh Circuit, the reasoning in *Lewis* conflicts with the Ninth Circuit's earlier decision on the subject in *Johnmohammadi*, 755 F.3d 1072, where this Court found that "the speed, informality, and lower costs of arbitration provide real advantages over litigating in court" and concluded that an arbitration agreement mandating individual arbitration can be enforced as written.

Nonetheless, because of an earlier decision issued in the Seventh Circuit, the *Lewis* court felt compelled to reach a conclusion in direct contrast to the Ninth Circuit's decision in *Johnmohammadi* and failed to distinguish the rationale in any meaningful way. This Court, meanwhile, should follow its own precedent and reject the Board's unsupportable, broad-sweeping conclusion that arbitration agreements always must be deemed unlawful when employers seek to enforce them to, in effect, limit an employee's ability to adjudicate claims on a class or collective basis.

Lastly, and most importantly, contrary to the *Lewis* court's conclusions and the Board's bald assertions, the NLRA does not preempt the FAA and its congressional mandate of enforcing parties' arbitration agreements according to their terms. As Petitioners explained in the Opening Brief, the FAA must be given the proper respect and arbitration agreements need to be treated no differently than any other contracts. The Supreme Court has made clear that bilateral resolution of claims is one of the "fundamental attributes of arbitration." *American Express v. Italian Colors Rest.*, 133 S.Ct. 2304, 2312 (2013) (quoting *Concepcion*, 131 S. Ct., at 1748). Yet, here, in contravention of the Supreme Court's pronouncements in *Concepcion*, 563 U.S. at 343, the Seventh Circuit and Board's approach creates "an obstacle to the accomplishment of the FAA's objectives." This hostility to

arbitration agreements undermines the FAA in the employment context and, thus, cannot be permitted.

Moreover, to date, all other federal circuit courts that have considered these issues have reached a contrary result. *See, e.g.*, *D.R. Horton*, 737 F.3d at 357; *Murphy Oil*, 808 F.3d 1013; *Cellular Sales of Missouri, LLC v. NLRB*, -- F.3d --, 2016 WL 3093363, at *2 (8th Cir. June 2, 2016); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1052-53 (8th Cir. 2013); *Sutherland v. Ernst & Young, LLP*, 726 F.3d 290, 295-98 (2d Cir. 2013). Here, the Ninth Circuit should do the same and follow its earlier acknowledgements, in *Richards*, 744 F.3d at 1075 n.3, as to the nationwide trend that the FAA must be read in conjunction with the NLRA and not be subsumed by it, as the Board proposes. As a result, this Court should reject the approach proposed by the Board and mistakenly adopted by the Seventh Circuit and join all of the other Circuits who have universally found that employers lawfully can seek to enforce arbitration agreements according to their own terms, even when they preclude class actions.

3. Supreme Court Precedent Protects Petitioners' First Amendment Petitioning of the Federal Court Against a Finding that an Unfair Labor Practice was Committed Here

The Board acknowledges that the binding United States Supreme Court decision in *Bill Johnson's Restaurants*, 461 U.S. 731, makes clear that petitioning of a court is Constitutionally-protected conduct under the First Amendment's right

to petition the Government. Nonetheless, the Board then attempts to improperly expand that decision's "exception" to the underlying situation.

As explained in the Opening Brief, Petitioners did not have "the objective of enforcing an illegal contract" or otherwise had "an illegal objective of applying an arbitration agreement to restrict employees' Section 7 rights," as the Board argues in the Opposition. Instead, unlike an employer illegally claiming trespass against union strikers, Petitioners simply moved to compel arbitration based on the parties' lawful and enforceable Arbitration Agreements, pursuant to the FAA, based on the precedential holdings from the Supreme Court's decisions in *Stolt-Nielsen*, 559 U.S. 662, and *Concepcion*, 563 U.S. 333. Accordingly, Petitioners acted properly in seeking to arbitrate the employment-related claims and the litigation position that Petitioners took in their motion cannot constitute a violation of Section 8(a)(1).

Contrary to the Board's assertions, Petitioners' filing in federal court of a motion to compel arbitration did not have an unlawful objective, since Petitioners have not sought the federal district court to interpret the Arbitration Agreements in a manner that would violate the NLRA. Rather, as explained, Petitioners merely sought to enforce the terms of the Arbitration Agreements as written, consistent with existing United States Supreme Court precedent, which indisputably holds that, pursuant to the FAA, arbitration agreements must be enforced according to their terms and class-wide arbitration can arise only by express agreement of the

parties. Since the Arbitration Agreements do not provide for class arbitration and are completely silent on the issue, there is nothing unlawful about Petitioners having filed the motions in federal court in such a manner. Thus, the holding in *Bill Johnson's Restaurants* makes clear that Petitioners' actions cannot be the basis of an unfair labor practice.

Simply put, any argument that Petitioners' constitutionally protected and guaranteed FAA right to file a motion to compel arbitration in federal court had an "illegal objective" is baseless and wrong. Accordingly, the Supreme Court's pronouncements in *Bill Johnson's* apply here to provide constitutional protections to Petitioners in their First Amendment-protected activity of filing their motion in federal court. Thus, the Court should hold that the purported violative actions cannot be deemed unfair labor practices and, accordingly, it should refuse to enforce the Board panel majority's Orders in this regard.

B. Petitioners Did Not Maintain an Unlawful Arbitration Agreement

Contrary to the Board's arguments in the Opposition, and the unreasonable conclusion of the Board panel majority in its incorrect and unsupported findings, Petitioners did not maintain an arbitration agreement that "interferes with employees' right to file charges with the Board" in violation of Section 8(a)(1) of the Act. Simply put, as demonstrated by the actions of Claimants here in actually filing unfair labor practice charges with the Board related to the Arbitration

Agreements, employees would not reasonably read the Arbitration Agreements maintained by CHL to prohibit them from filing unfair labor practice charges with the Board. The Board panel majority's conclusion to the contrary has no proper basis or support.

The Board's analysis of the decision in *Lutheran Heritage*, 343 NLRB 646 – which requires a finding that employees would reasonably construe a work policy to interfere with their access to the Board before finding a violation of the Act – fails to take into account the fact that the Company's Arbitration Agreements do not in any way restrict Section 7 rights on their face. While claiming something completely different, the Opposition arguments fail to reflect a reasonable employee's understanding of what he/she can and cannot do based on the Arbitration Agreement. Notably, the Board downplays the undisputed facts that employees subject to the Agreements actually have filed charges with the Board and baldly claim that a reasonable employee would understand the Agreements as prohibiting filing charges with the Board. Yet, there is no factual basis for this legal conclusion and the assertion simply reflects the Board's own subjective view of the Agreements' language. This is improper and should be outright rejected.

1. The Board Improperly Focuses On A Single Sentence of A Two-Page Agreement To Support Its Argument that Employees Would Reasonably Construe the Arbitration Agreements to Prohibit Their Right of Access to the Board

The Companies did not violate the Act. There is no proper legal or factual basis to conclude that, here, employees would reasonably believe that the Arbitration Agreements prohibit them from filing charges with the Board. Contrary to the Board's assertions, Petitioners do not dispute that the finding of a violation of the Act here is contingent on whether employees would reasonably construe the Arbitration Agreements to prohibit their right of access to the Board. *See Lutheran Heritage*, 343 NLRB at 647. But, nonetheless, it should be clear that employees, such as Claimants, would not – and, in fact, did not – reasonably construe the Arbitration Agreements to prohibit their right of access to the Board.

Notably, here, Claimants themselves believed, reasonably so, that they could file charges with the Board and that they were not precluded from filing such claims simply because they entered into the Arbitration Agreements. Indeed, Claimants filed the instant charges with the NLRB (and Petitioners do not contend that, automatically, they were procedurally precluded from doing so), which demonstrates that the Arbitration Agreements do not in any way restrict Claimants' ability to seek Board relief. Moreover, the filing of the instant charges with the Board further demonstrates that Claimants themselves did not reasonably believe that they were precluded from filing such claims with the NLRB.

When considering if an arbitration agreement violates the Act, the terms of the applicable agreement must be analyzed in their totality. Similarly, in determining whether a challenged rule or policy is unlawful, the Board "must refrain from reading particular phases in isolation, and must not presume improper interference with employee rights." *Lafayette Park Hotel*, 326 NLRB 824, 825, 827 (1998). Indeed, the Board has long applied the universally-accepted contract principle that "[t]here can be no question but that in ascertaining the meaning of any provision of a contract, that provision should be read in light of the contract as a whole, not in isolation, and that each provision, if possible, should be interpreted so as to harmonize with the other provisions." *Filltron Co.*, 134 NLRB 1691, 1700 (1961).

Here, the Board has improperly focused on a single facially-neutral sentence of a two-page agreement to support its argument that employees would reasonably construe the Arbitration Agreements to prohibit them from filing charges with the NLRB. Specifically, the Board claims that employees would reasonably believe that they must arbitrate any unfair labor practice charges, instead of going directly to the NLRB, since the Arbitration Agreements state that they cover all "claims for . . . violation of any federal, state or other governmental constitution, statute, ordinance, regulation, or public policy."

But, the plain language of the Arbitration Agreements, when read in their entirety, makes clear that the Agreements do not encompass the filing of an unfair labor practice charge with the Board, which is administrative and not judicial. For example, the Arbitration Agreements note that "the Company and Employee have entered into this Mutual Agreement to Arbitrate Claims ('Agreement') in order to establish and gain the benefits of a speedy, impartial and cost-effective dispute resolution procedure" since the "resolution of any differences in the ***courts*** is rarely time or cost effective for either party." They do not address claims that are raised with any administrative agency or in any such forum. Further, each Arbitration Agreement makes clear that "[a]ll arbitration covered by this Agreement shall be adjudicated in accordance with the state or federal law which would be applied by a ***United States District Court*** sitting at the place of the hearing" and the Agreements also set forth various procedures, such as discovery and motion practices, that are inherently inconsistent with proceedings conducted by the Board. Only this complete reading of the terms gives meaning to all of the language in the Arbitration Agreements. Such explicit language, thus, makes clear that employees would not reasonably construe the Arbitration Agreements to require them to arbitrate any alleged unfair labor practices arising out of their employment.

2. The Board's Explanation of Applicable Caselaw Does Not Change the Conclusion that Reasonable Employees Would Believe They Could File ULP Charges with the NLRB

As Petitioners explained in their Opening brief, and contrary to the Board's attempted reliance, *U-Haul Company of California*, 347 NLRB 375 (2006), is a clearly distinguishable case and the arbitration agreements at issue are not "nearly identical" as the Board claims. In *U-Haul*, the Board found that a mandatory arbitration policy that covered all "legal or equitable claims and causes of action recognized by local, state or federal law or regulations" violated the Act because employees reasonably would believe that they are precluded from filing charges with the Board. In reaching its conclusion, the Board made clear that its holding in *U-Haul* was "***limited to the specific clause at issue***" and that it was **not evaluating** the "lawfulness of [other] mandatory arbitration provisions." *Id*. at 380 n. 11 (emphasis added). The Board further noted that U-Haul distributed the arbitration policy to employees around the same time a union campaign was launched, which (considering the circumstances and the totality of the situation) may have led employees to reasonably believe they were precluded from filing charges with the Board. Lastly, the *U-Haul* arbitration policy is very different from the Agreements at issue here, considering that it consisted of a single paragraph containing the allegedly "problematic" phrase and made no mention of courts, discovery, motion

practice, or any other term that could be considered inconsistent with Board proceedings (unlike the language under consideration in this action).

The circumstances presented here, with the Arbitration Agreements, is very different from those faced by the Board in *U-Haul*. Here, unlike the situation in *U-Haul*, no employees of CHL are or ever were unionized and there simply is no evidence in the record (or otherwise) to suggest that the Arbitration Agreements were distributed to CHL employees in the midst of a union campaign. Further, in contrast to the short arbitration policy in *U-Haul*, the Arbitration Agreements are two pages in length and, as noted, contain numerous references to courts, discovery, and motion practice, all of which are inherently inconsistent with Board proceedings. Thus, unlike the simple agreement underlying the Board's ruling in *U-Haul*, the Arbitration Agreements read in their totality would not lead employees to reasonably believe they are precluded from accessing the Board or otherwise unable to file unfair labor practice charges simply because they signed one of the Agreements. Accordingly, the Court should reject the Board's unreasonable and baseless position that Petitioners maintained an unlawful arbitration agreement in this way and, instead, the Court should refuse to enforce the Orders as to this issue in their entirety.

III.
CONCLUSION

For the foregoing reasons and those set forth in the Opening Brief, Petitioners respectfully request that this Court grant its Petition for Review, setting aside and declining to enforce the Board's Order in its entirety, and providing Petitioners any other and further relief as this Court deems just and proper.

Dated this 29th day of July, 2016.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure, Rule 32(a)(7)(C), I certify that this Brief complies with the type-volume limitation of Federal Rules of Appellate Procedure, Rule 32(a)(7)(B), because this Brief contains 5,143 words, excluding the parts of the brief exempted by Federal Rules of Appellate Procedure, Rule 32(a)(7)(B)(iii).

I further certify that this brief complies with the typeface requirements of Federal Rules of Appellate Procedure, Rule 32(a)(5) and the type style requirements of Federal Rules of Appellate Procedure, Rule 32(a)(6) because this Brief has been prepared using Times New Roman 14-point font, a proportionately spaced typeface.

Dated this 29th day of July, 2016.

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CERTIFICATE OF FILING AND SERVICE

I certify that on this 29th day of July, 2016, I caused this REPLY BRIEF FOR PETITIONERS COUNTRYWIDE FINANCIAL CORPORATION, COUNTRYWIDE HOME LOANS, INC. AND BANK OF AMERICA CORPORATION to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users properly addressed to the following:

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